

ORIGINAL

No. 75559-5-1

Supreme Court No. 95540-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON,

Petitioner,

v.

STATE OF WASHINGTON and WASHINGTON STATE
BOARD OF PILOTAGE COMMISSIONERS,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Captain Bruce Nelson, petitioner here and appellant below, respectfully asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Captain Nelson seeks review of the decision by the Court of Appeals entered on December 11, 2017. A copy of the Opinion is provided in the Appendix 1.¹

C. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Is it an issue of substantial public interest when the State's licensing system for ensuring the safe pilotage and passage of oil tankers, cargo ships, and cruise liners on the Puget Sound treats similarly situated license applicants significantly differently, without adopting a rule or providing a sufficiently reasoned justification for doing so?

Issue No. 2: Does a significant question of law arise under the Constitutions of the State of Washington and United States when a State licensing agency, the Board of Pilotage Commissioners, exercises unfettered discretion in deciding whether to award a license to a qualified

¹ Appendix 1. Appendix 2 is the Court of Appeals' denial of Nelson's motion to publish dated January 18, 2018.

applicant who is seeking to become a Puget Sound ship pilot?

Issue No. 3: In such circumstances, are a license applicant's constitutional rights to Due Process and Equal Protection violated? ^{2,3}

Issue No. 4: Does the Decision conflict with this Court's precedents establishing the Board of Pilotage Commissioners' "duty to compose, administer and grade its examinations [for pilot licensing] in a fair and consistent manner," *Bock v. State Bd. of Pilotage Cmrs.*, 91 Wn 2d 94, 100 (1978), and to not allow decisions to be made according to each Commissioner's "own notions in each particular case." *State ex. rel. Sater v. Bd. of Pilotage Comm'rs*, 198 Wash. 695, 701-702, 90 P.2d 238 (1939)?

D. STATEMENT OF THE CASE

1. The Pilotage Commission's Use of Unfettered Discretion To Deny Captain Bruce Nelson a Puget Sound Pilot License Violated Due Process and Equal Protection

² On September 22, 2016, the Board of Pilotage Commissioners entered a stipulated judgment for \$6,100,000.00 in King County based on a jury verdict finding discrimination in denying a license to Trainee Katharine Sweeney who was in the same 2005 trainee class as Capt. Nelson. *Katharine Sweeney v. Board of Pilotage Commission*. No 11-2-36792-4SEA This was settled while the Board's appeal of the verdict was pending in Division 1. Case No. 72664-1-1. Appendix 3

³ Capt. Nelson has also sued the Board of Pilotage Commissioners for discrimination under the Washington Law Against Discrimination. Summary judgment was granted to the Board based on res judicata and collateral estoppel based on the first Final Order issued by the Board before remand. The appeal of that case has been stayed by the Court of Appeals for (5) five years waiting on a final decision in this case. The Court of Appeals declined to consolidate Nelson's discrimination case with this one. Case Nos. 68701-8-I and 69890-7-I.

Commissioner Dudley, Chairman of the Board of Pilotage Commissioners (“Board”) was asked, “Now, is it the position of the Board of Pilotage Commissioners that a member Commissioner could use criteria other than those adopted by the Board through rule making to make a licensing decision?” and he testified, “I just said, absolutely. They are entitled to do that, because we cannot control what drives their vote. ... I had no responsibility or right to tell that Board member, Oh, you can’t consider that. There is nothing that prohibits it, other than just general integrity.” AR00000340-341.

Bruce Nelson applied to be a Puget Sound Pilot. In 2005, he ranked #9 of 18 successful applicants on validated scored written tests and validated scored piloting simulations, earning entry on merit into the Puget Sound Pilot Trainee Program. As part of the trainee program he was assigned and rated on training trips. The initial training program assignments were substantially similar and in some cases identical for all trainees. AR00000323-325 VRP 3/30/2010 P. 30 Lines 24-P.32 Line 25; AR00000380:5-12;AR00000381:1-4 VRP 3/3-/2010 P.87 Line 5-P.88 Line 2. AR00004115.

After Capt. Nelson completed all assigned training trips in September 2007, the three licensed training and evaluation pilots on the Training Evaluation Committee (“TEC”) found Capt. Nelson had “successfully

completed” the pilot trainee program and unanimously recommended him to the Board as “suitable for licensing.” AR00003999.

However, as a result of the policy of unfettered discretion, Commissioner Ole Mackey, who is not a pilot, cast a deciding vote against Capt. Nelson’s licensure in September 2007. See, e.g., AR00001013:13; 1033:12. AR00000848:10-849:9. As a non-mariner, Mackey admitted he applied a totally different standard to Capt. Nelson than he applied to other trainees, faulting Capt. Nelson for taking even one day “off” during training. He referred to the training program as “boot camp”. AR00001019:25-1024:11. Commissioner Mackey did not raise this notion of “time off” being taken as a negative factor in determining whether to license the many other trainees who also took time off and were licensed. See AR00001020; AR00004267-68. Despite being informed before their votes that Commissioner and TEC Training Pilot Hannigan had “suggested a week off at the end of his 7 month of training program” prior to his extra month of training trips, and that “it was not an issue of stress”, AR00004331, Commissioner Mackey and two other Commissioners in emails or testimony cite the unadopted arbitrarily applied “days off” criteria as influencing their September 2007 vote against licensing Capt. Nelson. (Commissioner Addington at AR00001102:12- 1104:12; AR00001107:5; Commissioner Lee at

AR4335-4336).

Notwithstanding the TEC determination of “successful completion” of the Pilot Trainee Program, the Commissioners voted to deny Capt. Nelson a license. As a result, Capt. Nelson was put on repeated extension programs from Sept 2007 to April 2008, and in December 2008 the Commissioners voted to remove him from the licensing program. After that decision the Board first informed him of a right to appeal.⁴ Capt. Nelson appealed and asked for an administrative hearing. The initial hearing was not held until 2010. AR00000001.

Capt. Nelson in his initial administrative hearing sought to present comparator evidence of other trainees who were licensed including those licensed with less favorable scores and less difficult training trips to support his argument that he had not been treated equally by the Board when compared to similarly situated applicants, Goodenough Expert Testimony Report, AR00001418-1421, p. 3 and that such unequal treatment was a violation of his constitutional and substantive due process rights. He was denied that opportunity.

On the Board’s motion Administrative Law Judge Richard Roberts ruled that:

[Capt. Nelson] puts at issue the entire pilot-training process and,

⁴ If WAC 363-116-086 (2) (effective 10/22/2011) had been in effect in September 2007 Capt. Nelson could have appealed the denial of his license at that time. Appendix 4.

further, raises constitutional issues, the resolution of which may be beyond the authority of this tribunal. ... [T]his Tribunal ... does not find the performance of other pilot trainees to be very probative. ... I am, therefore, excluding ... any ... testimony ... regarding the performance of other pilot trainees. ... AR00000100:1-101:9.

On Day 3 of the initial hearing, ALJ Roberts stated that his position was “even stronger ... than when I made my initial ruling [,]... [with] the testimony of Capt. Dudley [Chairman of the Board] that these [training] programs are tailored to the individual pilots.” AR00000375:20-376:2. The ALJ stated, “I think it’s difficult for you to make general comparisons with that being the case.” *Id.*; AR00000552:4-7 (Day 4) (same).

ALJ Roberts thereafter entered an initial order affirming the denial of licensing to Capt. Nelson. AR15026675. As Nelson’s appeal of the initial order was pending before the Board awaiting the Final Order [AR1502667] from Commissioner Charles Adams pursuant to RCW 34.05.461, the Board enacted WAC 363-116-086.

That agency rule states, in part, that evidence of other pilot trainee’s performances in an appeal of a denial of a license will not be allowed because it is “not relevant.”

(b) The board has determined, in its discretion, that because each pilot trainee brings different skill sets to his or her training program as a result of their prior experience, and the trainee

evaluation committee develops an individually tailored training program based upon that pilot trainee's skill set and prior experience; comparisons between pilot trainees' performances in their respective training program are not relevant when assessing the pilot trainee's performance which is the subject of a notice of appeal and/or petition for review hereunder. Any documentation or testimony concerning the performance of other pilot trainees in their training program shall not be considered during any proceeding involved in the review process and shall not be submitted or solicited as evidence in any hearing under this section, nor shall it be submitted or solicited as evidence in any discovery deposition, nor shall it be included in the board's record of proceedings or any petition for review. Appendix 4. Wash. Admin. Code § 363-116-086, Effective Date 10/22/2011.

The Amended Final Board Order issued by Commissioner Adams on January 5, 2012 upheld the denial of Capt. Nelson's licensing. Capt. Nelson appealed to King County Superior Court. AR15026670.

The Honorable Mary Yu, who heard the appeal in the Superior Court in 2013, wrote in her Summary Decision:

The court declines to address the issue of disqualification of the Reviewing Officer (Commissioner Adams), but does find that the circumstances surrounding the adoption of the rule [WAC 363-116-086] prohibiting comparator evidence while this case was pending before the Commissioner creates the appearance of impropriety. p. 8, at fn. 2. Pleadings 20130613 AR15002114.

In her June 13, 2013 decision, Judge Yu also wrote:

The issue Nelson raises on appeal is in fact whether the Board did act in an arbitrary and capricious manner in how it evaluated Nelson's application and piloting abilities, and whether the method of evaluation was consistently applied to all applicants. The question cannot be answered without examining how other applicants were evaluated and what standards were used for such

individuals. Comparator evidence would assist the trier of fact in determining whether Nelson's training was 'fair and consistent.' *Bock v. State*, 91 Wn.2d [94] at 100 [1978].⁵ Any concern that the subjective nature of the Board's assessments could be compromised by such comparisons should bear on the weight of the evidence and not its admissibility.

... [T]his court agrees with Nelson's assertion that 'how [the Training Evaluation Committee and Board applied trip evaluation form scores] to one [trainee] versus another is absolutely essential, both to a determination of validity and reliability, and to a determination of fairness...'. Pleadings 20130613 AR15002109, pp. 3, 7.

In remanding, Judge Yu ordered:

further fact-finding and consideration of comparator evidence that was improperly excluded by Judge Roberts during the administrative hearing. Nelson was entitled to have a meaningful opportunity to be heard in a meaningful time frame. An order finding that the Board correctly denied Nelson his pilot license must be supported by substantial evidence which must include an analysis of how the granting and denial of licenses was actually administered at the time Nelson's license application was pending. Summary Decision on Administrative Law Review Pleadings 20130613 AR15002113-114, pp. 7-8 (emphasis added).

Judge Yu further found that in the initial hearing: **"The Board's actions were impaired by an appearance of unfairness:"** *Order Granting Petitioner's Motion for Attorney Fees Under Equal Access to Justice Act RCW 4.84.350, p. 2 CP 125.*

Despite the explicit language in Judge Yu's remand order, ALJ

⁵ *Bock* also involved the denial of a Puget Sound Pilot's license. "The Board... has a duty to compose, administer and grade its examinations in a fair and consistent manner." *Bock*, 91 Wn.2d at 100.

Roberts made only conclusory findings, “*The TEC and Board did not use comparative evidence in making their licensing recommendations or decision[s]*” and that the “comparator evidence ... presented by [Capt. Nelson]... to demonstrate that other members of the class were also poor performers and yet they were licensed, was **unpersuasive**. ... [S]uch comparisons were not made by the Board or the TEC.” AR15026661-6662. ALJ Roberts cited to the WAC disallowing comparator evidence in his Initial Order on Remand, at p. 2, fn. 3 AR15026650, and entered essentially the same order as before. (Compare Initial Order on Remand AR15026649 with Initial Order AR15026675).

For the remand hearing the Board retained the services of Dr. Peter Scontrino to, among other things:

... look at all the training trip reports for Captain Nelson, and for other [trainees] too, and to see what a statistical analysis would tell me about them. AR15001350...to pick out trends, pick out relationships, and understand what the data are telling me. AR15001349

Dr. Scontrino testified that the training trips given to Capt. Nelson were “**significantly more difficult**” than those given to any other trainee. AR15001472; VRP 3/14 2014 p.138 lines 18-22. And despite that, his summative scores⁶ were at or near the median of all the trainee pilots who

⁶ Dr. Hertz, another Board expert, testified that “..summative assessments are at the end of the training and they’re designed to make decisions;.... about whether the pilot trainee learned the information that’s necessary to be a safe and effective pilot in Puget Sound.

were licensed. Exhibit I-11-I. AR15003745 Appendix 5. The Board did not explain why Capt. Nelson's performance would not be seen as even better given the that his training trips were significantly more difficult than all other trainees. AR15003745 Appendix 5.

This comparator analysis corroborated David Goodenough, expert for Capt. Nelson, and showed that if he had been evaluated and treated as other trainees prior to and after him, Capt. Nelson would have been licensed in September 2007. Goodenough Report, p. 3 AR00001418-1421. The Board offered no comment or explanation for this different treatment in its Final Order. AR15026642.

Despite this and other evidence of unfettered discretion in the Board's licensing decisions, the Board affirmed the denial of Capt. Nelson's license. The Superior Court affirmed the Board's Final Order and the Court of Appeals likewise affirmed.

2. The Law Requires Constitutional Standards for Licensing

The Board must have a constitutional licensing program that evaluates Puget Sound Pilot license trainees in a "fair and consistent" manner. *Bock*, 91 Wn 2d at 100. The Board must use RCW 34.05 APA

So all of the information that's available would be used in a summative assessment to make the evaluation of whether a pilot was capable of operating safely and effectively. "AR00000645-646

rulemaking to establish or alter any qualifications or standards for issuance of licenses; and it must provide due process review. RCW 88.16.035 (1)(a); RCW 34.05.570(3)(c) *Bock* at 97; *see also Providence Physician Servs. Co. v. Washington State Dep't of Health*, 196 Wn. App. 709, 726, 384 P.3d 658, 666–67 (2016).

The Board maintains that the measure or standard of “successful completion” is met whenever the Commissioners vote and “determine that it should be ‘the collective judgment of the Board ... [that] the standard is met.’” AR00000220:10- 221:24.

The Washington State Constitution bars the Board from determining to whom pilot licenses are issued “upon a personal basis, at the will and pleasure of the board”; or “according to their own notions in each particular case”. *State ex rel. Sater v. Bd. of Pilotage Comm'rs.*, 198 Wash. 695, 701-702, 90 P.2d 238 (1939) (en banc), *citing* Const. art. I, § 12. “[T]he discretion reposed in [the Board] is ... [*not*] a license to do as it pleases.” *Id.*, at 704.

[Though] [t]he Board has considerable discretion in carrying out [its] duties[,] ... [i]n exercising its discretion, ... it must not act in an arbitrary or capricious fashion, or with improper motives. ... The Board thus has a duty to compose, administer and grade its examinations [for licensing] in a *fair* and *consistent* manner. *Bock v. Bd. of Pilotage Comm'rs.*, 91 Wn.2d 94, 100, 586 P.2d 1173 (1978).

The Board has “no discretion” in regards to meeting its mandatory

duty of “fair and consistent” treatment of pilot license applicants. *See Sater*, 198 Wn. at 701; *Bock*, 91 Wn.2d at 100. If the Board fails to meet this duty, then “there is ... an abuse of discretion... and in such cases the law will, by mandamus, compel the [Board] to act honestly and fairly.” *Sater*, 198 Wn. at 700. This Court “has the power to vacate and annul the order of [the] board which is not the result of the exercise of an honest discretion, but is an arbitrary and capricious action.” *State ex rel. Yeargin v. Maschke*, 90 Wn. 249, 254, 155 P. 1064 (1916), *cited in Sater*, 198 Wn. at 700.

3. The Washington Administrative Procedure Act (“WAPA”) Requires a Reasoned Justification for Inconsistent Agency Action.

The Board ... [must] follow, distinguish, or overrule its own similar cases. ... [E]ven though the Board has broad discretion, it cannot arbitrarily treat similar situations in dissimilar ways. Merely asserting that the circumstances are ‘unique’ or ‘unusual’ does not provide a proper guideline for the future exercise of the Board’s discretion....*See Carnation Co. v. NLRB*, 429 F.2d 1130, 1135 (9th Cir. 1970) (citations omitted).⁷

WAPA authorizes Courts to grant relief from any order that:

- 1) “is inconsistent with an agency rule, *unless the agency provides facts and reasons to demonstrate a rational basis for*

⁷ RCW 34.05.001 provides that “the legislature ... intends that the courts should interpret provisions of [the Washington Administrative Procedures Act] consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts.”

inconsistency." RCW 34.05.570 (3)(h), or;

2) where "[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied." RCW 34.05.570 (3)(a) (emphasis added).

In this case, the Board's Order does not offer a "sufficiently reasoned justification" for applying rules, scores and personal notion requirements for "successful completion" of training differently to Capt. Nelson and treating him differently from other trainees.

Judge Mary Yu's Summary Orders on June 13, 2013 held as to:

Inconsistent weighting of training trip scores

Finally, this Court agrees with Nelson's assertion that "how [the Training Evaluation Committee and Board applied trip evaluation form scores] to one [trainee] versus another is absolutely essential, both to a determination of validity and reliability, and to a determination of fairness ... " Pleadings 20130613 AR15002113 P. 7.

... a subjective individualized evaluation of a trainee's performance must ... be measured against objective criteria of which an applicant is informed in advance." Pleadings 20130613 AR15002110 P. 4.

In the Board's Findings on Remand, Judge Yu's Decision was ignored by the Board FF # 41-51 AR15026659-6662.

50. The TEC and Board did not use comparative evidence in making their licensing recommendations or decisions. Instead, both the TEC and Board closely examined the entire record of each trainee and made their decisions based on each trainee's performance. This detailed and expert analysis of each trainee's

performance in his or her training program means that counting the number of interventions or low scores is misleading. The details of each trip mattered.

51. The comparator evidence that was presented by [Capt. Nelson], in which isolated incidents were plucked from the hundreds of pages of a pilot trainee's training trips to demonstrate that other members of the class were also poor performers and yet they were licensed, was unpersuasive. The evidence of record is clear and was oft repeated, even by some of the Appellant's own witnesses, that such comparisons were not made by the Board or the TEC. It was the overall performance of a pilot trainee as evidenced by all of the training trip reports, the recommendations of the TEC and the Commissioner's own expertise and experience which determined whether pilot trainees would be licensed, continued in training or be let go from the program. AR15026661-6662

The Board evaded Judge Yu's mandate to show objective criteria against which all applicants were consistently measured by the Board. Further, the Board made no findings regarding Capt. Nelson's comparative evidence analysis, and took no action to overcome the appearance of impropriety and adhering to WAC 363.116.086(3)(b) that comparator evidence is not "relevant". See Pleadings 20150302 AR15002579-2595.

The Board's Findings make no mention of nor explanation of Dr. Scontrino's evidence that Capt. Nelson received **significantly more difficult** training trips than **any** other trainee. AR15026642-6666.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. A Substantial Public Interest is Involved Because a Fair and Consistent Pilot Licensing System is Required to Ensure Public

Safety RAP 13.4(b)(4)

“[I]t is the policy of the state of Washington to prevent the loss of human lives, loss of property and vessels, and to protect the marine environment of the state of Washington through the sound application of compulsory pilotage provisions in certain of the state waters.” RCW 88.16.005. “The Board ... has a duty to compose, administer and grade its examinations [for licensing pilots] in a fair and consistent manner.” *Bock v. State Bd. of Pilotage Cmrs.*, 91 Wn. 2d 94, 100 (1978)

2. Review is Warranted under RAP 13.4(b)(3) and (4) Because the Court of Appeals Decision Presents a Significant Question of Law under the Constitution and Involves Substantial Public Interest that Should be Addressed by this Court

Both the Equal Protection Clause and the APA prohibit agencies from treating similarly situated petitioners differently without providing a **sufficiently reasoned justification for the disparate treatment**. ... [A] hand-waving reference to ‘highly fact-specific determinations’ does not free the [Board] of this obligation. *Muwekma Ohlone Tribe v. Kempthorne*, 452 F.Supp.2d 105, 115-116, 119 (D.D.C., 2006).

[T]o utter the words ‘unique facts and circumstances’[,] ... as a wand waved over an undifferentiated porridge of facts, leaves regulated parties and a reviewing court completely in the dark as to the core of [the Board’s] reasoning and its relationship to past precedent.... Without more explanation, it is impossible to say whether [the Board] has acted reasonably or capriciously. *Philadelphia Gas Works v. F.E.R.C.*, 989 F.2d 1246, 1251 (D.C. Cir. 1993).

The Court of Appeals erroneously affirmed the Board’s discretion

to find “comparative treatment” evidence irrelevant, and its concomitant failure to make “reasoned analyses” or factual findings regarding differences in treatment of trainee applicants did not violate due process or equal protection.

The Court of Appeals affirmed that it was within the Board’s discretion to award licenses without a method, standard or criteria against which to compare the “entire record of each trainee” finding that the programs were “unique” and the fact that Captain Nelson received “significantly more difficult” training trips than all other applicants, or that he scored at or near the median of successful applicant trainees, and all Nelson’s other evidence of different treatment, “unavailing”:

Nelson next contends that substantial evidence does not support the Board’s finding of fact that a training program unique to each applicant was created. But Nelson’s appellate briefing effectively concedes that the training trips assigned to each pilot applicant were unique, acknowledging that the training trips between applicants were “substantially similar” and “comparable” and that “the small variations simply account fo [sic] trainees’ prior background and experience.” Nelson’s claim fails. Slip OP.9

Nelson contends that the Board’s decision was arbitrary and capricious because it did not consider the statistical evidence that, he claims, supports that he was subjected to more difficult trips than other applicants and that his trip report ratings and number of interventions were comparable to applicants who were granted a pilot’s license. This contention is unavailing. the Board found that, rather than comparing isolated types of incidents, it “closely examined the entire record of each trainee” and made its decision “based on each trainee’s

performance.” Slip OP. 14 fn 7.

The record shows that the training programs were substantially similar and in some cases identical. *Supra* at 3. But as testified to by Dr. Scontrino, the Board’s expert, the training trips given to Capt. Nelson **were significantly more difficult than the trips for other applicants.** AR15001472; VRP 314 2014 p.138 lines 18-22. And despite that higher difficulty, his summative scores were at or near the median of all the pilots who were licensed. Exhibit I-11-I. AR15003745 Appendix 5.

The Board offers no basis for treating Capt. Nelson so differently and fails to articulate any objective standards that governed its decision in denying a license. Rather it simply maintains that the standard of “successful completion” authorizing a trainee to receive a license is met whenever the Board members “determine that it should be ‘the collective judgment of the Board’... [that] the standard is met.” AR00000220:10-221:24.

In administrative proceedings, the “rudiments of fair play” must be observed. *Austin Chevrolet, Inc. v. Motor Vehicle Bd. & Motor Vehicle Div. of Tex. Dep’t of Transp.*, 212 S.W.3d 425, 438 (Tex. App.—Austin 2006) (quoting *335 *Office of Pub. Util. Counsel v. Pub. Util. Comm’n*, 185 S.W.3d 555, 576 (Tex. App.—Austin 2006, pet. denied)). **An administrative “licensing authority acts arbitrarily and unlawfully if it treats similarly situated applicants differently without an articulated justification.”** *Id. Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 334–35 (Tex. 2017) (emphasis added)

3. The Court of Appeals Decision Conflicts with This Court's Holdings that the Board Must Act in a "Fair and Consistent" Manner and Not Based on Each Commissioner's "Own Notions" RAP 13.4(b)(1)

This Court has held that it violates the Fourteenth Amendment of the Constitution to give the Board the right to determine to whom pilot licenses are issued "upon a personal basis, at the will and pleasure of the board" and "according to their own notions in each particular case." *State ex rel. Sater v. Bd. of Pilotage Cmrs.*, 198 Wash. 695, 700 (1939) (en banc). And without objective standards the Board acts as it pleases in determining who gets a pilot license.

This Court has also held that the Board of Pilotage Commissions' licensing decisions are subject to § 12, of article 1, of the Washington State Constitution, which states that "No law shall be passed granting to any citizen... privileges or immunities which, upon the same terms, shall not equally belong to all citizens[.]" *State ex rel Sater v. Bd. of Pilotage Cmrs.*, 198 Wash. 695, 702 (1939). *Accord Bock v. State Bd. of Pilotage Cmrs.*, 91 Wn. 2d 94, 100 (1978) ("The Board ... has a duty to compose, administer and grade its examinations [for licensing] in a **fair and consistent manner.**")

Despite this Court's prior decisions in *Bock* and *Sater*, the Board acknowledges allowing Commissioners to use criteria outside of that

adopted by the Board through rule-making in deciding whether to license a trainee. AR00000339-343. *Supra.* at 3. The Board has no objective standards for determining when a trainee successfully completes the training program and has excluded the right to present any evidence as to how other trainees are treated by enacting WAC 363.116.086. Appendix 4.

The decision of the Court of Appeals directly contradicts this Court's prior decisions regarding the actions of the Board of Pilotage Commissioners. The Court of Appeals decision if not reversed is an affirmation for the Board and other licensing agencies to use unfettered discretion and standardless licensing placing the public and the State at great risk. As a result, the public needs clarification from this Court that a licensing Board must adhere to due process in testing and appeals.

F. CONCLUSION

Capt. Bruce Nelson respectfully requests that this Court accept review of this case, reverse the Court of Appeals, set aside the Board's order pursuant to RCW 34.05.570(3)(a) and enter a declaratory order under RCW 34.05.574(1) determining that the Board's Trainee Program as applied to Capt. Nelson violated RCW 34.05.570(3)(a) and the Constitution; and find that further review before the Board is futile. RCW 34.05.534 (3)(b). Capt. Nelson was 53 years old when certified

"successfully completing" in September 2007. He is now 63 years old.

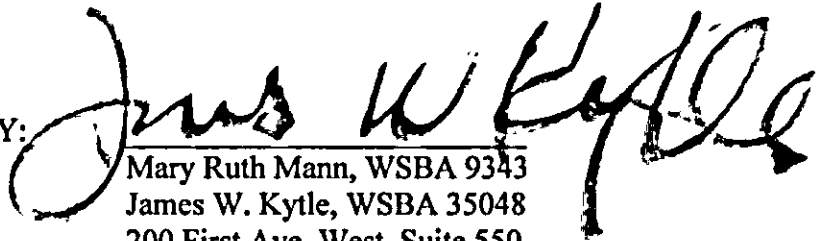
Mandated retirement for pilots is 70 years of age.

Remand is impracticable. RCW 34.05.574(1).

RESPECTFULLY SUBMITTED this 16th day of February 2018.

MANN & KYTLE, PLLC

BY:

A large, stylized handwritten signature in black ink, appearing to read "James W. Kyle". The signature is written over a horizontal line that separates it from the printed text below.

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PROOF OF SERVICE

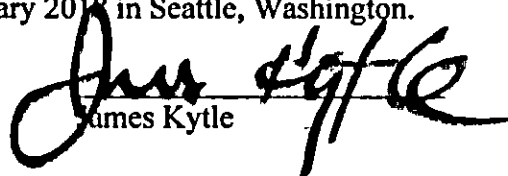
The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing pleading to be served *via email* on the following attorneys:

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DATED this 16th day of February 2018 in Seattle, Washington.


James Kytle

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STATE OF WASHINGTON
2018 FEB 16 AM 10:12

APPENDIX 1

Concluding that there was no error, we affirm.

The Board of Pilotage Commissioners is charged with training, licensing, and regulating marine vessel pilots operating in the Puget Sound and Grays Harbor pilotage districts. When the Board determines that the pilotage districts require additional pilots to optimize the pilotage service therein, the Board invites those captains who have already demonstrated a high level of experience as sea captains to apply for a pilot's license. Obtaining a pilot's license is a multi-step process involving examinations and, if successful in the examinations, a complex training program. An applicant's invitation to apply for a pilot's license or to participate in the training program does not guarantee that the Board will issue a pilot's license to the applicant.

In 2006, Nelson was invited to apply for a pilot's license. He successfully took the Board's written and simulator examinations, scoring 9th out of 18 applicants. He was then invited to enter into the Board's pilotage training program for the Puget Sound Pilotage District. Nelson's invitation letter detailed a training program that was anticipated to involve 174 trips and was tailored to his experience as a sea captain, aiming to give him exposure to the wide variety of ships and conditions that a pilot in the Puget Sound pilotage district may encounter.

Nelson's training program—along with the training program for other applicants—was overseen both by the Board and a committee of licensed pilots, known as the Training Evaluation Committee. The Committee was designated

by the Board to manage the training program. In that capacity, the Committee tracked the applicants' progress in the training program through direct observation during training trips and a comprehensive review of training trip report forms submitted by supervising pilots after each completed trip.

The training trip report forms allowed the supervising pilot to indicate on a point scale an applicant's effectiveness on that trip with regard to specified categories related to the criteria used by the Board in making licensing and training decisions.¹ In addition, the report forms contained a written comment section wherein the supervising pilot could make specific comments about the trip and the applicant's performance. Each week, the information in each applicant's training trip report forms would be consolidated into a spreadsheet and provided to the applicant. Thereafter, at the end of a training period, the Committee would review the applicant's record and issue its recommendation to the Board as to whether the applicant should be licensed, should not be licensed, or should undergo additional training.

Nelson accepted the training terms in mid-November and his training program commenced in January 2007. Seven months and over 100 training trips later, the Committee reviewed Nelson's performance. The Committee determined that Nelson had performed inconsistently and recommended that the

¹ The training trip report form included the categories of preparation, navigation, ship handling, and master/pilot/bridge team interface. An applicant's performance in each of the categories was recorded on a four-point scale. Nearly a year into Nelson's training program, the Board altered the training trip report form, adding "the domains of anchoring, tug escort procedures, and special circumstances." The Board also changed the point scale from a four-point scale to a seven-point scale. The alterations to the training trip report form applied to all ongoing training programs.

Board extend Nelson's training program by two months. The Board then considered the Committee's recommendation and unanimously agreed to extend Nelson's training program, adding specific training trips to his training program in an attempt to address the inconsistencies in his performance.

Two months later, the Committee reviewed Nelson's training program performance. On this occasion, the Committee issued a split recommendation to the Board. Three committee members recommended that the Board issue a license to Nelson and two members recommended that he receive additional training. A majority of the Board (4-3) rejected the recommendation of the majority of the Committee members and voted instead to extend Nelson's training program.

Three months later, the Committee reviewed Nelson's performance during the training program and determined that there was a "disconnect" in his ship-handling skills, that he lacked situational awareness, and that he lacked the ability to process "all the necessary information" in confined waterways. With this, the Committee recommended to extend Nelson's training. The Board agreed with the Committee's recommendation and unanimously voted to extend Nelson's training program.²

A month and a half later, the Committee reviewed Nelson's performance and again recommended to extend his training, this time for four additional

² In January 2008, Nelson contracted an illness and the Board voted to extend his training until February.

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months. The Board agreed with the Committee's recommendation and extended his training program.

Three months later, Nelson participated in his 221st training trip. This trip involved a grain ship, the Pier 86 grain terminal, and an evaluation of Nelson's docking skills using a tugboat. During that trip, a senior supervising pilot—and member of the Committee—was forced to intervene in Nelson's tugging of the grain ship in order to avoid substantial damage to the grain terminal and to the ship. The supervising pilot managed to reduce the ship's speed, stabilizing it 30 feet away from its docking berth.

One month later, Nelson completed his final training program extension. By that time, he had taken 243 training trips.

The Committee engaged in an extensive review of Nelson's performance during the training program. The Committee determined that he was performing many piloting tasks well. The Committee concluded, however, that Nelson performed inconsistently throughout his extended training program regarding criteria that the Committee viewed as "essential when docking and undocking a ship," specifically, the "critical ship handling elements of speed control, heading control, and the use of tugboats." Relatedly, the Committee noted with concern that there were 11 instances, occurring after Nelson had already completed 80 training trips, where a supervising pilot felt compelled to intervene in Nelson's piloting.

Moreover, the Committee viewed the Pier 86 grain terminal intervention as a "very serious" intervention. It concluded that the training trip was characterized

as relatively easy and that the intervention had occurred near the end of Nelson's training program. The Committee expressed concern that Nelson was not improving as an applicant and, notably, that "there was a significant risk to the public for continuing him in the training program." Therefore, the Committee unanimously recommended that the Board not license Nelson.

The Board elected to defer voting on the Committee's recommendation, allowing Nelson to prepare his own presentation to the Board. In the intervening six months, Nelson requested, gathered, and submitted information to the Board, and, in October 2008, presented his argument. Two months later, the Board unanimously voted to deny issuance of a license to Nelson.

Nelson timely sought an adjudicative proceeding before an administrative law judge (ALJ) to review the Board's decision. The parties conducted extensive discovery and a seven-day hearing resulted. During the hearing, Nelson sought to introduce evidence comparing the Board's evaluation of his performance with that of other similarly situated applicants in the training program who the Board eventually voted to license. The ALJ excluded the evidence, determining that it was not probative. After the hearing, the ALJ issued an initial order affirming the Board's decision not to license Nelson.

Nelson appealed the ALJ's initial order and the Board appointed a review officer to review the initial order and prepare a final order on behalf of the Board. Upon consideration, the review officer affirmed the ALJ's order and issued the Board's final order. The final order incorporated the ALJ's findings of fact and

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conclusions of law and included additional findings of fact by the reviewing officer.

Nelson appealed the Board's final order to the King County Superior Court, arguing that the ALJ erred by excluding the evidence comparing the Board's evaluation of his performance in the training program with that of other similarly situated applicants. The superior court judge agreed, remanding the case with instructions to allow Nelson to present comparator evidence in an adjudicative proceeding to ensure that the applicants' performance in the training program was measured against objective criteria.

A six-day administrative hearing resulted before the ALJ who presided over the initial hearing. At the hearing, the parties presented evidence comparing the Board's evaluation of Nelson's performance in the training program with that of similarly situated applicants. Thereafter, the ALJ issued an initial order on remand affirming the Board's decision not to license Nelson.

Nelson appealed the ALJ's initial order on remand and the Board appointed a different review officer to review the initial order and prepare the Board's final order. The review officer affirmed the ALJ's initial order on remand and issued the Board's final order. The final order incorporated the ALJ's findings of fact and conclusions of law and included several additions to the ALJ's findings of fact and conclusions of law.

Nelson appealed the Board's final order to the King County Superior Court. The superior court affirmed the Board's final order.

II

A

We review a decision of an agency pursuant to the Administrative Procedure Act³ (APA). Davidson Serles & Assocs. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 159 Wn. App. 148, 154, 244 P.3d 1003 (2010) (citing Thurston County v. Cooper Point Ass'n, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002)).

The APA requires that we base our review upon the record made before the agency. Davidson Serles & Assocs., 159 Wn. App. at 154 (citing City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)). We review the agency's legal conclusions de novo, giving substantial weight to the agency's interpretation of the statute that it administers. Davidson Serles & Assocs., 159 Wn. App. at 154 (citing City of Redmond, 136 Wn.2d at 46). The burden of demonstrating the invalidity of the agency's action is on the party asserting invalidity. RCW 34.05.570(1)(a). We may grant relief from an agency action only if we determine "that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

B

As a preliminary matter, Nelson challenges several of the Board's findings of fact as not supported by substantial evidence. We discuss each challenged finding as necessary.

³ Ch. 34.05 RCW.

Nelson first contends that substantial evidence does not support the Board's finding that adopted the reports and opinions submitted by the Board's expert witness.

We defer to the expertise and experience of the Board regarding expert witness credibility determinations. Seattle City Light v. Swanson, 193 Wn. App. 795, 816, 373 P.3d 342 (2016) (citing Beatty v. Fish & Wildlife Comm'n, 185 Wn. App. 426, 449, 341 P.3d 291 (2015), review denied, 183 Wn.2d 1004 (2015)); Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 588, 90 P.3d 659 (2004). Here, it is evident that the Board considered the credibility of the expert witness and all of the witness's testimony and evidence when it credited his testimony in entering findings of fact. Nelson's claim fails.

Nelson next contends that substantial evidence does not support the Board's finding of fact that a training program unique to each applicant was created. But Nelson's appellate briefing effectively concedes that the training trips assigned to each pilot applicant were unique, acknowledging that the training trips between applicants were "substantially similar" and "comparable" and that "the small variations simply account fo [sic] trainees' prior background and experience." Nelson's claim fails.

Lastly, Nelson's appellate briefing sets forth a list of findings of fact that he contends are not supported by substantial evidence. However, his appellate briefing fails to present argument or analysis with regard to these findings in relation to a substantial evidence claim. "Unsubstantiated assignments of error are deemed abandoned." Kittitas County v. Kittitas County Conserv. Coal., 176

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Wn. App. 38, 54, 308 P.3d 745 (2013). We thus deem abandoned Nelson's remaining substantial evidence challenges.

There was no error.⁴

C

Nelson next contends that the Board's decision to deny him a pilot's license was arbitrary and capricious. We disagree.

We review issues of law de novo, including whether an agency's decision is arbitrary and capricious. Stewart v. Dep't of Soc. & Health Servs., 162 Wn. App. 266, 273, 252 P.3d 920 (2011) (citing Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n, 149 Wn.2d 17, 24, 65 P.3d 319 (2003)).

Pursuant to RCW 34.05.570(3)(i), a petitioner may challenge an agency's order on the ground that the order is arbitrary or capricious.

"Arbitrary and capricious" refers to "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."

Pub. Util. Dist. No. 2 of Pac. County v. Comcast of Wash. IV, Inc., 184 Wn. App. 24, 45, 336 P.3d 65 (2014) (internal quotation marks omitted) (quoting Lane v. Port of Seattle, 178 Wn. App. 110, 126, 316 P.3d 1070 (2013)), review denied, 183 Wn.2d 1015 (2015).

⁴ Nelson contends that the Board's orders extending his training program were not supported by substantial evidence and were arbitrary and capricious. We decline to consider Nelson's claim. Only final agency actions are subject to judicial review. Wells Fargo Bank, N.A. v. Dep't of Revenue, 166 Wn. App. 342, 355-56, 271 P.3d 268 (2012); accord Bock v. State Bd. of Pilotage Comm'rs, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978).

The Pilotage Act⁵ created the Board of Pilotage Commissioners and regulates pilotage in the state of Washington. The act was adopted "to ensure against the loss of lives, loss or damage to property and vessels, and to protect the marine environment" and to encourage and develop "Washington's position as an able competitor for waterborne commerce from other ports and nations of the world." RCW 88.16.005. The Board is to be comprised of commissioners "representing the interests of the people of the state of Washington." RCW 88.16.005.⁶

In addition, the act required that the Board establish rules necessary for enforcement and administration of the act. RCW 88.16.035(1)(a). This included creating "a comprehensive training program to assist in the training and evaluation of pilot applicants before final licensing." RCW 88.16.035(b)(ii). The final licensing qualifications for pilot applicants include successful completion of a board-specified training program and "such additional qualifications as may be determined by the board." RCW 88.16.035(1)(b)(i), .090(2)(a)(iv), (4).

The act provides that, upon completion of the training program, "the board shall evaluate the trainee's performance and knowledge." RCW 88.16.090(4). Accordingly, the Board promulgated regulations setting forth the criteria by which it evaluates an applicant's performance and knowledge. The Board established

⁵ Ch. 88.16 RCW.

⁶ The Board of Pilotage Commissioners includes appointed commissioners who are "pilots licensed under this chapter and actively engaged in piloting upon the waters covered by this chapter," individuals "actively engaged in the ownership, operation, or management of deep sea cargo and/or passenger-carrying vessels," "a representative from a recognized environmental organization concerned with marine waters," and "persons interested in and concerned with pilotage, maritime safety, and marine affairs, with broad experience related to the maritime industry exclusive of experience as either a state licensed pilot or as a shipping representative." RCW 88.16.010.

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that the criteria "shall include, but not be limited to: Performance in the training program; piloting and ship handling and general seamanship skills; local knowledge; and, bridge presence and communication skills." WAC 363-116-080(5). The act further provides that, after carrying out its evaluation, "[t]he board, as it deems appropriate, may then issue a pilot license, delay the issuance of the pilot license, deny the issuance of the pilot license, or require further training and evaluation." RCW 88.16.090(4).

In reviewing the Board's actions, we keep in mind that the Board "has considerable discretion" in carrying out its statutorily authorized duties. Bock v. Bd. of Pilotage Comm'rs, 91 Wn.2d 94, 100, 586 P.2d 1173 (1978) (citing State ex rel. Sater v. Bd. of Pilotage Comm'rs, 198 Wash. 695, 90 P.2d 238 (1939)).

Here, the Board voted to deny issuance of a license to Nelson based upon its evaluation of his performance and knowledge. The Board indicated that it had evaluated Nelson's candidacy based upon the criteria set forth in WAC 363-116-080(5). With this criteria in mind, the Board considered the Committee's licensing recommendation, the Board's review of all of Nelson's training trip report forms, and the experience and expertise of the Board's commissioners.

The Board determined that, during Nelson's extended training program, he had failed to consistently perform regarding the ship-handling criteria essential to docking and undocking a ship. Relatedly, the Board found as a matter of concern the number of occasions on which a supervising pilot was compelled to intervene in Nelson's piloting during training trips taking place late in his training program.

The Board also determined that, in denying to issue Nelson a license, "[t]he details of each trip mattered." This is notable because the Board found that the major intervention at the Pier 86 grain terminal a month prior to the end of his fourth training extension was a "very serious" intervention. The Board found that the Pier 86 incident supported a conclusion that he was not improving and that a significant risk to the public was posed by continuing him in the training program.

In this light, the Board's decision not to license Nelson was plainly based on the facts and circumstances underlying his performance and knowledge.

There was no error.

Nelson next contends that the Board's decision was arbitrary and capricious because it treated him differently than it treated other license applicants. We disagree.

The Board found that there were 18 similarly situated applicants who took and passed the written and vessel simulator examinations at the same time that Nelson did and who were invited to participate in the training program. Of those applicants, 6 received training extensions. Ultimately, 3 of the applicants were not licensed.

The Board further found that the applicants were evaluated consistently. The Board determined that each applicant was required to pass the same written and vessel simulator tests and participate in at least 130 observational and supervised training trips. The Board also determined that the same training trip report forms were used to track the applicants' progress during the training program. In addition, the Board found that those applicants who struggled were

consistently given additional training trips tailored to the area of difficulty that the applicant was experiencing. The Board further found that it had closely examined the entire training record of each applicant and considered of great significance the details of each applicant's training trips. The Board also found that it had applied the licensing criteria set forth in WAC 363-116-080(5) to each applicant in deciding whether to license the applicant.

Given that the Board assessed the applicants using the same methodology and criteria, the Board did not evaluate Nelson's performance and knowledge in a way that was meaningfully different than its evaluation of other similarly situated applicants. There was no error.

Accordingly, the Board's decision to deny issuance of a license to Nelson was not arbitrary or capricious.⁷

⁷ Nelson contends that the Board's decision was arbitrary and capricious because it did not consider the statistical evidence that, he claims, supports that he was subjected to more difficult trips than other applicants and that his trip report ratings and number of interventions were comparable to applicants who were granted a pilot's license. This contention is unavailing.

The Board's decision is not arbitrary and capricious merely because the Board elected not to adopt Nelson's preferred method of evaluating pilot applicants. Rather, the Board evaluated the applicants' performance and knowledge using the criteria duly promulgated pursuant to its statutory authority. Indeed, the Board found that, rather than comparing isolated types of incidents, it "closely examined the entire record of each trainee" and made its decision "based on each trainee's performance."

Nelson next contends that the Board's decision to deny him a license constituted the exercise of arbitrary administrative power in violation of the Fourteenth Amendment to the United States Constitution as well as article I, section 12 of the Washington Constitution. Because we reject Nelson's statutory claim of arbitrary and capricious action by the Board, we also reject Nelson's constitutional claim of arbitrary and capricious action by the Board.

Nelson next contends that the Board's decision to decline to issue him a pilot's license was arbitrary and capricious because the Board's final order relied upon portions of an expert witness's report that had been withdrawn from evidence. This claim fails. The ALJ indicated that those portions of the unredacted report that were excluded would not be considered and Nelson presents no analysis or argument showing that the Board relied on the portions of the expert's report that were withdrawn.

D

Nelson next contends that the Board violated the APA by adopting and altering the training trip report form used to record applicants' training trip performance without first engaging in rule making. We disagree.

We review de novo whether an agency's action constitutes a "rule" under the APA. "[I]t is axiomatic that '[f]or rule-making procedures to apply, an agency action or inaction must fall into the APA definition of a rule.'" Budget Rent A Car Corp. v. Dep't of Licensing, 144 Wn.2d 889, 895, 31 P.3d 1174 (2001) (alteration in original) (quoting Fallor's Pharmacy v. Dep't of Soc. & Health Servs., 125 Wn.2d 488, 493, 886 P.2d 147 (1994)). Under the APA, "[r]ule" includes "any agency order, directive, or regulation of general applicability . . . (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession." RCW 34.05.010(16). We note that "an otherwise broad interpretation of 'rule' would 'serve as the straightjacket of administrative action.'" Providence Physician Servs. Co. v. Dep't of Health, 196 Wn. App. 709, 726, 384 P.3d 658 (2016) (quoting Budget Rent A Car, 144 Wn.2d at 898).

The training trip report forms used during the time in which Nelson was participating in the training program were provided by the Board pursuant to WAC 363-116-078(13).⁸ The training trip report form set forth the piloting domains of preparation, navigation, ship handling, and master/pilot/bridge team

⁸ "After each trip, the supervising pilot shall complete a trip report form provided by the board." WAC 363-116-078(13).

interface and included a four-point scale for recording an applicant's performance in those domains. Over a year into his training program, the Board altered its trip report form, adding the domains of anchoring, tug escort procedures, and special circumstances and setting forth a seven-point scale, rather than a four-point scale.

The piloting domains set forth in the training trip report form are based on the Board's licensing criteria. Indeed, the trip report form's piloting domains—preparation, navigation, ship handling, and master/pilot/bridge team interface, anchoring, tug escort procedures, and special circumstances—are plainly derived from the Board's non-exhaustive list of evaluation criteria—which includes “[p]erformance in the training program; piloting and ship handling and general seamanship skills; local knowledge; and, bridge presence and communication skills.” WAC 363-116-080(5). The training trip report form thus did not establish or alter a qualification or standard for the issuance of a pilot's license. Rather, it set forth a recording methodology to track an applicant's performance in the training program based on preestablished criteria. Similarly, the Board's alteration of the point scale in the training trip report form did not alter the qualifications or standards for licensing but, rather, set forth a more nuanced recording methodology for tracking an applicant's performance.

Thus, the Board's adoption and alteration of the trip report form does not fall into the APA definition of a rule.⁹

⁹ Nelson relies upon two decisions by our Supreme Court that, he claims, support his argument that the Board's adoption and alteration of the training trip report form constituted a rule under the APA. See Simpson Tacoma Kraft Co. v. Dep't of Ecology, 119 Wn.2d 640, 647, 835 P.2d 1030 (1992) (adoption of statewide numeric water quality standard for discharge of a

There was no error.

E

Nelson next contends that, during the course of the administrative proceedings in this matter, the Board engaged in several unlawful procedures or decision-making processes. Each allegation is discussed in turn.

RCW 34.05.570 provides, in pertinent part: "(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: . . . (c) The agency has engaged in *unlawful* procedure or decision-making process, or has failed to follow a *prescribed* procedure." (Emphasis added.) Again, this court "shall grant relief only if it determines that a person seeking judicial relief has been *substantially prejudiced* by the action complained of." RCW 34.05.570(1)(d) (emphasis added).

We do not consider arguments unsupported by authority or analysis. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Nelson first contends that the Board engaged in an unlawful procedure or decision-making process when a Board commissioner engaged in rule making concerning a proposed rule that would exclude evidence seeking to compare

pollutant constitutes an agency rule because violation of standard would subject violators to punishment); Fallor's Pharmacy, 125 Wn.2d at 495-96 (alteration of prescription services reimbursement schedule constitutes agency rule because reimbursement schedule regarded a benefit conferred by law).

Neither decision supports his claim. The training trip report forms—and any point on the point-scale that was recorded by a supervising pilot—neither subject applicants to punishment nor confer a benefit by law. Rule making was not required.

various pilot applicants' performances against one another as part of the Board's evaluation of an applicant.

As an initial matter, Nelson's appellate briefing does not identify *which* prescribed procedure or decision-making process that the commissioner in question failed to follow. In this way, Nelson does not support his claim with authority or analysis. In addition, Nelson does not show that the commissioner's participation in rule making substantially prejudiced him. Indeed, he presents no evidence that the commissioner in question participated in the deliberations surrounding the final order at issue or that the commissioner's participation in the rule making procedure impacted the initial or final order denying the issuance of a license to him. There was no error.

Nelson next contends that the Board engaged in an unlawful procedure or decision-making process when a Board commissioner, during a jury trial concerning another plaintiff's suit against the Board, said that he was "pleased with the results" of the ALJ's initial order on remand in Nelson's administrative matter.

However, Nelson does not present authority or analysis regarding the prescribed procedure or decision-making process that, he claims, the commissioner failed to follow. Even so, Nelson does not show that the commissioner's comment during the unrelated litigation substantially prejudiced him. He again presents no evidence that the commissioner in question participated in the Board's final order here at issue or that the commissioner's

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comment impacted the Board's final order denying issuance of a license to him. There was no error.

Nelson next contends that the Board engaged in an unlawful procedure or decision-making process when, during the initial adjudicative proceeding in 2010, the ALJ dismissed an expert witness due to a time constraint before Nelson's counsel indicated that she had finished her cross-examination of the witness.

Nelson's appellate briefing also does not present authority or analysis regarding the prescribed procedure or decision-making process in which the ALJ failed to engage. Moreover, Nelson does not show that he was substantially prejudiced by the ALJ's decision to dismiss the expert witness. The ALJ ruled that Nelson's counsel had successfully authenticated a document during cross-examination and otherwise had a fair opportunity to cross-examine the witness in the time allowed. In addition, Nelson's appellate briefing neither identifies the evidence that he was prevented from eliciting from the expert witness nor the manner in which that evidence allegedly impacted the Board's final order denying him a license. There was no error.

Nelson next claims that the Board engaged in unlawful procedure or decision-making when the ALJ allowed an expert witness's unredacted report to be placed in the administrative record when portions of the report had been previously excluded or withdrawn.

Nelson's appellate briefing does not present authority or analysis regarding the prescribed procedure or decision-making process in which the ALJ failed to engage. Moreover, even were we to consider his claim, Nelson does

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not demonstrate how he was prejudiced by the ALJ's actions. Indeed, he does not show that the Board, in fact, relied upon those portions of the expert's report that were excluded or withdrawn, notwithstanding that the report was admitted in an unredacted form. Nelson's claim fails.

Nelson next contends that the Board engaged in an unlawful procedure or decision-making process when it relied upon a memorandum that summarized the Committee's recommendation not to license him prior to voting on whether to issue him a pilot's license. This is so, he asserts, because he was not given access to the memorandum prior to the Board's licensing vote.

Again, Nelson fails to present authority or analysis regarding a procedure or decision-making process in which the Board failed to engage. Regardless, even if we considered his claim, Nelson does not show that the Board's possession of a summative memorandum resulted in substantial prejudice to him. Indeed, the information in the memorandum had been previously provided and presented to the Board and to Nelson during the course of his training program. There is no indication that any of the information set forth in the memorandum was new information. No entitlement to relief is established.

Accordingly, Nelson does not establish that the Board engaged in an unlawful procedure or decision-making process during the administrative proceedings.

F

Nelson next contends that the Board's criteria for licensing pilots are unconstitutionally vague.

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We may grant relief from an agency's order when "[t]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied." RCW 34.05.570(3)(a).

"[A]n administrative rule adopted pursuant to statutory authority is presumed valid and should be upheld when consistent with the enabling statute."

Keene v. Bd. of Accountancy, 77 Wn. App. 849, 854, 894 P.2d 582 (1995) (quoting Ravsten v. Dep't of Labor & Indus., 108 Wn.2d 143, 154, 736 P.2d 265 (1987)). "Similarly, regulations and statutes are presumed to be constitutional." Keene, 77 Wn. App. at 854 (citing Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991)).

As with a statute, a rule is void for vagueness "if it is framed in terms so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" Haley, [117 Wn.2d] at 739 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 128, 70 L. Ed. 322 (1926)). However, it is not necessary that a person be able to predict with complete certainty exactly when his or her conduct would be classified as prohibited. Haley, [117 Wn.2d] at 740. Moreover, "the use of vague terms does not necessarily render a statute as a whole impermissibly vague." Haley, [117 Wn.2d] at 741.

Keene, 77 Wn. App. at 854:

Indeed, "impossible specificity standards are not required." Heesan Corp. v. City of Lakewood, 118 Wn. App. 341, 352, 75 P.3d 1003 (2003) (citing City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988)). This is because, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Haley, 117 Wn.2d at 740 (quoting Grayned v. City of Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).

Our decision in Chandler v. Office of Insurance Commissioner, 141 Wn. App. 639, 173 P.3d 275 (2007), is instructive. At issue in Chandler was whether a statute setting forth that "an applicant for an insurance agent's license must be 'a trustworthy person'" was unconstitutionally vague. 141 Wn. App. at 660 (quoting former RCW 48.17.150(1)(f) (2005)). We rejected Chandler's claim, reasoning that,

The term "untrustworthy" need not be purely objective. And including a vague term in a statute does not necessarily render it impermissibly vague because courts do not analyze statutory words in isolation from the context in which they appear. The common knowledge and understanding of members of a profession can clarify a statutory term, such as untrustworthiness, when no objective standard is provided. The purpose of RCW 48.17.530 is to protect the public and the profession's standing in the eyes of the public. In the context of the common knowledge and understanding of members of the insurance profession, the terms "trustworthy" and "untrustworthy" are sufficiently clear to put an insurance agent on notice that certain conduct is prohibited.

Chandler, 141 Wn. App. at 661 (footnotes omitted) (citing State v. Foster, 91 Wn.2d 466, 474, 589 P.2d 789 (1979); Haley v. Med. Disciplinary Bd., 117 Wn.2d 720, 742, 818 P.2d 1062 (1991); Cranston v. City of Richmond, 40 Cal.3d 755, 765, 710 P.2d 845, 221 Cal. Rptr. 779 (1985); Morrison v. State Bd. of Educ., 1 Cal.3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969)).¹⁰

Here, the Board relied upon the criteria set forth in WAC 363-116-080(5) in voting to deny issuing a license to Nelson. Again, the criteria include, but are not limited to, "[p]erformance in the training program; piloting and ship handling

¹⁰ See also Haley, 117 Wn.2d at 742-43 ("moral turpitude" in a disciplinary statute not unconstitutionally vague because "[p]hysicians no less than teachers, . . . veterinarians, . . . police officers, . . . [or insurance agents] will be able to determine what kind of conduct indicates unfitness to practice their profession").

and general seamanship skills; local knowledge; and, bridge presence and communication skills." WAC 363-116-080(5).

The criteria set forth in WAC 363-116-080(5) are not unconstitutionally vague. First, the licensing criteria adopted by the Board are informed by the provisions of chapter 88.16 RCW. Again, the intended purpose of the chapter is "to ensure against the loss of lives, loss or damage to property and vessels, and to protect the marine environment" and to encourage and develop "Washington's position as an able competitor for waterborne commerce from other ports and nations of the world." RCW 88.16.005. In addition, the Board is authorized to issue pilot's licenses so as to ensure "safe, fully regulated, efficient, and competent pilotage service." RCW 88.16.035(1)(d). Therefore, the licensing criteria are informed by the intent of the legislature and the scope of the Board's statutory authority, both of which emphasize safety, environmental protection, and commercial efficacy.

Furthermore, the licensing criteria are further informed by the common knowledge and understanding of members of the pilotage profession and the traits that would render a pilot applicant unfit to pilot a marine vessel.

Thus, the Board's licensing criteria are not unconstitutionally vague.

Nelson's claim fails.¹¹

¹¹ Nelson relies on three appellate decisions to support his claim that the Board's licensing criteria are impermissibly vague. Derby Club, Inc. v. Becket, 41 Wn.2d 869, 252 P.2d 259 (1953), Sater, 198 Wash. 695; Woods v. Dist. of Columbia Nurses' Examining Bd., 436 A.2d 369 (D.C. App. 1981).

Nelson's reliance is unavailing. Unlike the criteria here at issue, the challenged regulation or statute in the decisions relied upon by Nelson either set forth no standard at all or set forth a standard devoid of any concrete meaning. See Derby Club, 41 Wn.2d at 877 (statute "prescribe[d] no standards by which the liquor control board may determine who is and who is not entitled to a license to operate a bottle club") (emphasis added); Sater, 198 Wash. at 701

G

Nelson next contends that the Board's decision denying him a pilot's license deprived him of his right to due process. This is so, he asserts, because the period of time between the completion of his training program and the Board's final order on remand denied him a meaningful opportunity to be heard in a meaningful time.

"Procedural due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner."" [In Re Det. of Morgan, 180 Wn.2d [312,] 320[, 330 P.3d 774 (2014)] (quoting Amunrud [v. Bd. of Appeals], 158 Wn.2d [208,] 216[, 143 P.3d 571 (2006)]) (quoting Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976))). "The process due depends on what is fair in a particular context." Morgan, 180 Wn.2d at 320. In Mathews, the United States Supreme Court articulated a balancing test to aid in determining when, and to what extent, procedural protections are required:

[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

In re Det. of Hatfield, 191 Wn. App. 378, 396-97, 362 P.3d 997 (2015).

Here, Nelson made use of the administrative procedures that were available to him to challenge the Board's orders. The amount of time that passed

(interpretation of act unconstitutional if it permits Board "to issue a license to any applicant they may believe to be qualified"); Woods, 436 A.2d at 373-74 (regulation allowing board to issue a license "[u]pon showing of cause satisfactory to it" unconstitutional because no standard defined what causes were satisfactory for a license).

between hearings in this matter was reasonable. There is no indication that Nelson was unable to be heard in a meaningful time.

Moreover, in asserting that an unconstitutional denial of due process resulted from the time period taken to decide whether to issue him a pilot's license, Nelson argues only the first of the three Mathews factors: that he had a property and liberty interest in his trainee license and training stipend. However, even assuming that he has such an interest, Nelson does not attempt to establish the remaining two factors, as required by Mathews. Rather, he asserts that, because of the amount of time between the end of his training program, the Board's vote to not license him, and the completion of the administrative and judicial review of the Board's final order, he was necessarily deprived due process. By failing to engage in a suitable analysis of the Mathews factors, Nelson fails to establish a due process claim.¹² There was no error.

H

Nelson next contends that he was denied a fair hearing before the Board because, he alleges, the board review officers who reviewed the ALJ's initial orders in this matter engaged in unlawful *ex parte* communications with the Board's legal counsel.

¹² Nelson also contends that the Board denied him due process when it ended his training program, thereby depriving him of his trainee license and a \$6,000 per month stipend. To support this proposition, Nelson, in a footnote, relies upon two cases.

Nelson fails to present argument or analysis showing the applicability of this authority to the matter here at issue. RAP 10.3(a)(5), (6). Moreover "placing an argument . . . in a footnote is, at best, ambiguous or equivocal as to whether the issue is truly intended to be part of the appeal." Pub. Util. Dist., 184 Wn. App. at 84 n.49 (internal quotation marks omitted) (quoting Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 497, 254 P.3d 835 (2011)). We decline to consider this aspect of Nelson's claim.

RCW 34.05.455(1) reads: "A presiding officer may not communicate, directly or indirectly, regarding any *issue* in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate, except as provided in this subsection." (Emphasis added.)

Nelson first contends that an unlawful *ex parte* communication occurred when the board review officers in question attended an open-door meeting during which the Board's legal counsel mentioned the procedural posture and calendar dates regarding Nelson's superior court litigation against the Board.

The subjects mentioned by the Board's legal counsel were not a substantive communication regarding an issue in Nelson's administrative proceeding. There is no indication that a substantive discussion of the issues presented in his administrative matter took place at the open-door meeting in question. Moreover, Nelson fails to show that he suffered from actual or even probable bias. Nelson's claim fails.

Nelson next contends that a board review officer engaged in unlawful *ex parte* communication with the Board's legal counsel during a closed-door meeting relating to litigation matters.

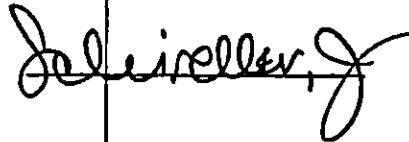
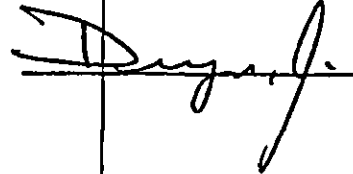
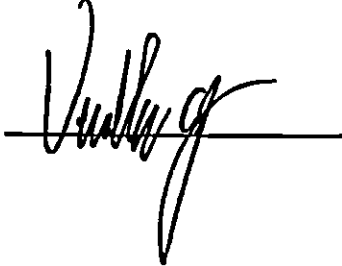
The Board indicated that the closed-door meeting identified by Nelson concerned litigation relating to another plaintiff's lawsuit against the Board and that his administrative matter was not discussed therein. Nelson does not present evidence rebutting the Board's claim that the meeting concerned

No. 75559-5-1/27

litigation unrelated to his administrative matter. In addition, he does not provide evidence showing that the board review officer's participation in the closed-door meeting prejudiced him. Nelson's claim fails.¹³

Affirmed.

We concur:



¹³ Nelson next contends that the ALJ, during his administrative proceeding, improperly used the arbitrary and capricious standard in reviewing the Board's decision not to license him. To the contrary, the ALJ's use of the arbitrary or capricious standard was proper. Bock, 91 Wn.2d at 100 (citing Sater, 198 Wash. 695). There was no error.

Nelson next asserts that "remand to the Board's administrative process is futile" because the decision-makers are "entrenched" and "will not consider comparator evidence" or "whether fair and equitable licensing procedures" were used. For this proposition, he cites to RCW 34.05.534(3)(b), relating to exhaustion of remedies prior to filing his petition for review. Whether Nelson exhausted—or was required to exhaust—available administrative remedies prior to filing his petition for review does not bear on whether an order from this court remanding the decision is futile. Nelson does not present further argument or analysis regarding this claim. We thus decline to consider it. In any event, given our ultimate disposition of this appeal, the claim is of no moment.

APPENDIX 2

APPENDIX 3

FILED
KING COUNTY, WASHINGTON

OCT 01 2014

SUPERIOR COURT CLERK
BY Ed Queco
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY**

KATHARINE ANN SWEENEY, an
Individual,

Plaintiff,
vs.

WASHINGTON STATE BOARD OF
PILOTAGE COMMISSIONERS,

Defendant.

NO. 11-2-36792-4 SEA

Special Verdict Form

We, the jury, answer the following questions as follows:

QUESTION 1: Did the Board of Pilotage Commissioners discriminate against Plaintiff? (Answer "yes" or "no")

Answer: Yes

(If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Did the Board of Pilotage Commissioners' actions proximately cause damage to the plaintiff? (Answer "yes" or "no")

Answer: Yes

(If you answered "no" to Question 2, sign this verdict form. If you answered "yes", answer Question 3.)

QUESTION 3: What do you find to be the amount of plaintiff's damages?

Lost Past Earnings and Fringe Benefits: \$ 1,120,000

Lost Future Earnings and Fringe Benefits: \$ 954,250

Emotional Harm: \$ 1,541,708

10/1/2014
Date

JMWSohl
Presiding Juror
Judith M.W. Sohl

FILED

2016 SEP 22 PM 3: 59

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

**CERTIFIED
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**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

NO. 11-2-36792-4SEA

STIPULATED JUDGMENT

(Clerk's Action Required)

KATHARINE ANN SWEENEY, an
individual,

Plaintiff,

v.

WASHINGTON STATE BOARD OF
PILOTAGE COMMISSIONERS

Defendants.

Judgment Summary (RCW 4.64.030):

<u>Judgment Creditor:</u>	Katharine Ann Sweeney
<u>Judgment Creditor's Attorneys:</u>	Breskin Johnson & Townsend, PLLC Deborah Senn Law Offices
<u>Judgment Debtor:</u>	Washington State Board of Pilotage Commissioners
<u>Judgment Amount:</u>	\$6,100,000.00
<u>Pre-Judgment Interest:</u>	\$0.00
<u>Post-Judgment Interest:</u>	\$0.00
<u>Taxable Costs and Attorney Fees:</u>	Included in Judgment Amount

THIS MATTER having come on regularly before the undersigned judge of the above-entitled Court; and the Plaintiff, Katharine Ann Sweeney, acting by and through Breskin Johnson & Townsend, PLLC and Deborah Senn Law Offices, her attorneys, and the Defendant, State of

AMENDED STIPULATED JUDGMENT

ATTORNEY GENERAL OF WASHINGTON
Torts Division
7141 Cleanwater Dr. SW
PO Box 40126
Olympia, WA 98504-0126
(360) 586-6300

COPY

1 Washington, and the Washington State Board of Pilotage Commissioners, acting by and through
2 Robert W. Ferguson, Attorney General, and Allyson Zipp, Assistant Attorney General; and these
3 parties having made a stipulation pursuant to RCW 4.92.150, settling and compromising this
4 action against the Defendants and allowing for dismissal of this action with prejudice against the
5 Defendants, and it appearing to the Court, after a review of the files and records herein, that the
6 sum of \$6,100,000 is a proper and just settlement to be paid by the Defendant, State of
7 Washington, to the Plaintiff; and the Court being fully advised, now, therefore,

8 IT IS HEREBY ORDERED that Plaintiff, Katharine Ann Sweeney, shall have judgment
9 against the Defendant State of Washington for the total sum of \$6,100,000 million of which
10 \$2,440,000 shall be deducted as attorney fees and costs payable to Ms. Sweeney's attorneys (the
11 "judgment creditor's attorneys"). Additionally, any liens, subrogated interests, or outstanding
12 medical bills of which Plaintiff's counsel has actual or constructive notice prior to court approval
13 of this settlement shall be resolved out of these gross amounts, and defendant shall have no
14 liability for any such liens, interest, or bills.

15 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall
16 recover against any other party their respective fees, costs, nor interest herein except as provided
17 herein.

18 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the settlement and
19 compromise is reasonable, and that the Plaintiff shall have judgment against the Defendant State
20 of Washington as detailed below.

21 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

22 1. Plaintiff Katharine Ann Sweeney, shall have judgment against the Defendant State of
23 Washington for the total sum of \$6,100,000 and No/100 Dollars.

24 2. The judgment of \$6,100,000 shall be satisfied as follows:

25 a. The State of Washington shall pay \$4,035,000 out of the \$6,100,000 to the Clerk
26 of the above-entitled court. Upon an Order of Disbursal by the Court, the Clerk shall pay to

1 Katharine Ann Sweeney the sum of \$2,580,000 and shall pay to Breskin Johnson & Townsend
2 the sum of \$1,455,000.

3 b. The remaining sum of \$2,065,000 out of the total judgment of \$6,100,000 shall be
4 paid by the State of Washington directly to the Assignees set forth below to fund a structured
5 settlement for the benefit of Katharine Ann Sweeney, which shall provide her future periodic
6 payments, and a structured settlement for the benefit of Deborah Senn, which shall provide her
7 future periodic payments. The State of Washington is not the guarantor of the amount or
8 occurrence of any future payment called for under the structured settlement listed in Section (c).
9 Further, the combined total paid to or for the benefit of the Plaintiff by the State of Washington to
10 the clerk of the court and to fund structured annuities, shall never, under any circumstances,
11 exceed a present value of \$6,100,000 and No/100 Dollars.

12 c. The State of Washington shall pay the \$2,065,000 as follows:

13 1) \$1,080,000 shall be paid directly to BARCO Assignments, LTD ("assignee"), care of
14 Ringler Associates, 10655 N.E. Fourth Street, Suite 314, Bellevue, Washington 98004, tel: (800)
15 334-7542, to fund future periodic payments for the benefit (PAYEE) as set forth below:

16 Payee: Katharine Ann Sweeney

17 \$9,520.00 payable monthly beginning 2/1/2017 guranteed for 10 years certain with the
18 last guaranteed payment on 1/1/2027. (Addendum A)

19 Payee acknowledges that the Periodic Payments cannot be accelerated, deferred, increased
20 or decreased by the Payee; nor shall the Payee have the power to sell, mortgage, encumber, or
21 anticipate the Periodic Payments, or any part thereof, by assignment or otherwise.

22 Any payments to be made after the death of the Payee pursuant to the terms of this
23 judgment shall be made to the Estate of the Payee. Payee may submit a change of beneficiary, in
24 writing to Assignee. No such designation, nor any revocation thereof, shall be effective unless it
25 is in writing and delivered to Assignee. The designation must be in a form acceptable to
26 Assignee.

1 Defendant State of Washington ("Assignor") will make a non-qualified assignment to
2 BARCO Assignments, LTD. Plaintiff hereby consents to such an assignment and agrees (a) that
3 Assignee is not required to set aside specific assets to secure such Periodic Payments, and (b) that
4 Assignee's obligation to make Periodic Payments shall be no greater than those of Assignor
5 immediately preceding the assignment. Upon assignment, Assignee or its designee, shall mail
6 future payments directly to Payee unless otherwise directed by Payee.

7 Upon making such a non-qualified assignment, Assignor shall be fully released from all
8 obligations to make the Periodic Payments and only Assignee shall be obligated to make the
9 Periodic Payments. Discharge of the liability to make any Periodic Payment shall be determined
10 by the payment mode in which the payment is made. Assignee may and will fund the Periodic
11 Payments set forth above by purchasing an annuity policy from Liberty Life Assurance Company
12 of Boston ("Annuity Issuer"), All rights of ownership and control of such annuity policy shall be
13 vested in Assignee, but Assignee may have Annuity Issuer make payments directly to Payee for
14 Assignee's convenience.

15 2) \$985,000 No/100 Dollars shall be paid directly to Structured Assignments, Inc ("the
16 Assignee"), care of Ringler Associates, 10655 N.E. Fourth Street, Suite 314, Bellevue,
17 Washington 98004, tel: (800) 334-7542, to fund future periodic payments for the benefit
18 (PAYEE) as set forth below:

19 Payee: Deborah Senn

20 \$13,753.05 payable monthly beginning 1/15/2017 guaranteed for 6 years certain with the
21 last guaranteed payment on 12/15/2022. (Addendum B)

22 Each attorney and the law firm hereby waives and disclaims any and all ownership interest
23 or liens that they may have in the settlement proceeds by reason of any applicable state statute,
24 common law decision or ruling. By their signature, the Plaintiff and each attorney and the law
25 firm, acknowledge that the attorney fee benefit payments are being made at the direction of the
26 Plaintiff and for the convenience of the Plaintiff.

1 It is understood and agreed by the parties that the Periodic Payment benefit amounts
2 shown above are just an illustration of what could be purchased on a given date, and that the
3 benefit amounts will change depending on the rates at the time of the actual purchase. The
4 parties agree that all Periodic Payments required under this Agreement will be adjusted either
5 upward or downward, so that the total cost to the Defendant and/or its Assignee for the
6 Periodic Payments to or for the benefit of Payee shall be neither more than or less than
7 \$985,000.00
8

9 Deborah Senn acknowledges and agrees that the election to receive Periodic Payments,
10 as outlined above, was an election by Deborah Senn made prior to the execution of this
11 agreement. Such an election by Deborah Senn is irrevocable and cannot be rescinded under
12 any circumstances by Deborah Senn.
13

14 Deborah Senn acknowledges that the Periodic Payments cannot be accelerated,
15 deferred, increased or decreased by the Plaintiff or any Payee; nor shall the Plaintiff or any
16 Payee have the power to sell, mortgage, encumber, or anticipate the Periodic Payments, or any
17 part thereof, by assignment or otherwise.

18 Any payments made after the death of Deborah Senn pursuant to the terms of this
19 Settlement Agreement shall be made to the Estate of Deborah Senn. The Payee may request in
20 writing to the Assignee a change of beneficiary designation. The designation must be in a
21 form acceptable to the Assignee.
22

23 Plaintiff acknowledges and agrees that the Defendant ("Assignor") may make a non-
24 qualified assignment of the Defendant's liability to make the Periodic Payments referred to
25 above in (2) to Structured Assignments, Inc. ("the Assignee"). The Assignee shall fund its
26 obligation by the purchase of the United States Government Securities. All rights of ownership

1 and control of the United States Government Securities, which will be identified in an
2 attachment to the completed Application entitled Evidence of Assets held in Trust, shall be and
3 remain vested in the Assignee. The Assignee's obligation for payment of the Periodic
4 Payments shall be no greater than that of the Defendant (whether by judgment or agreement)
5 immediately preceding the assignment of the Periodic Payments obligation. That amount is
6 neither more than or less than \$985,000.00.
7

8 Any such assignment, if made, shall be accepted by the Plaintiff without right of
9 rejection and shall completely release and discharge the Defendant from the Periodic Payments
10 obligation assigned to the Assignee. The Plaintiff recognizes that, in the event of such an
11 assignment the Assignee shall be the sole obligor with respect to the Periodic Payments
12 obligation, and that all other releases with respect to the Periodic Payments obligation that
13 pertain to the liability of the Defendant shall thereupon become final, irrevocable and absolute.
14

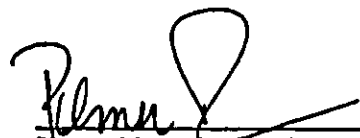
15 The obligation of the Assignee to make each Periodic Payment shall be discharged
16 upon the mailing of a valid check in the amount of such payment to the designated address of
17 the Payee(s) named above in this Settlement Agreement

18 3) The State of Washington shall disburse all funds required by this Release to the
19 required Clerk of the Court and Assignees simultaneously. Receipt by the Clerk shall be notice
20 that the funds to be paid to BARCO and Structured Assignments, Inc., have been made. Upon
21 deposit of funds with the Clerk, Plaintiff is authorized to present an Order of Disbursal in
22 accordance with the Stipulated Judgment and the Clerk is authorize to dismiss this action as set
23 forth below.
24

25 4) In accordance with RCW 4.92.160, upon payment of the lump payments required by
26 this Stipulated Judgment to the clerk of the court and to assignees BARCO and Structured


1 Assignments, Inc., the clerk shall dismiss with prejudice all claims and cause of action that
2 Plaintiff, Katharine Ann Sweeney may have against the State of Washington and the Washington
3 Board of Pilotage Commissioners with prejudice.

4
5 DONE IN OPEN COURT this 22 day of Sept, 2016.


6
7
8 
9 Honorable Catherine Shaffer, Judge


10 Approved as to Form and
11 Notice of Presentation Waived:

12 ROBERT W. FERGUSON
13 Attorney General

14
15 
16 ALLYSON ZIPP, WSBA # 38076
17 Assistant Attorney General
Attorneys for Defendant

Presented by:
Breskin Johnson & Townsend, PLLC

18 
19 David E. Breskin, WSBA # 10607

20 
21 Deborah Senn, WSBA # 8987
22 Deborah Senn Law Offices

23
24 Attorneys for Plaintiff

25
26

APPENDIX 4

WAC § 363-116-086

This file includes all rules adopted and filed through the 17-21 Washington State Register (WSR),
December 6, 2017

***Washington Administrative Code > TITLE 363. PILOTAGE COMMISSIONERS, BOARD OF > CHAPTER
116. PILOTAGE RULES***

**WAC 363-116-086. Challenges to board actions concerning licensing determinations
and appeal procedures.**

This section shall apply to all proceedings involving a board determination made pursuant to WAC 363-116-080:

- (1) Pilot trainees who enter a training program as provided in this chapter shall provide the board with an address to be used for notification purposes. Such address shall be a place at which mail is delivered. In addition, a pilot trainee may provide the board with other means of contact such as telephone numbers and/or e-mail addresses. It will be the responsibility of the pilot trainee to ensure that the board has a current mailing address at all times. The mailing address will be considered the primary means of notice by the board. Notice delivered to the address provided by the pilot trainee will be considered received by the pilot trainee for the purpose of receipt of notification of the board's decision to deny a pilot license or extend a training program as provided in subsection (2) of this section.
- (2) A pilot trainee who is denied a license or continued in his or her training program, pursuant to a decision rendered under WAC 363-116-080(5), shall be notified of the board's determination, in writing, by the chair of the board as soon as practicable. The pilot trainee shall have twenty days from which notice of the decision is served to file a notice of appeal of the board's decision with the board, pursuant to WAC 10-08-110 and 10-08-211. The board's decision will become a final order upon expiration of twenty days from the date notice is served, unless notice of appeal has been filed prior to that time. Upon the filing of the notice of appeal, the chair of the board shall appoint a presiding officer, who shall conduct the hearing and issue an initial order pursuant to chapter 34.05 RCW.
- (3) Any hearing conducted pursuant to a request for review as indicated in subsection (2) of this section shall be conducted pursuant to the rules set forth in chapters 10-08 and 363-11 WAC and this section. In the event of a conflict, this section shall control.
 - (a) The board and the trainee evaluation committee shall be required to produce no more than a total of two fact witnesses and no more than one expert witness in connection with any hearing pursuant to this section, unless the board's chair, in his or her sole discretion, believes additional witnesses are necessary to present its case. This limitation shall apply to the hearing and any prehearing discovery.

WAC § 363-116-086

- (b) The board has determined, in its discretion, that because each pilot trainee brings different skill sets to his or her training program as a result of their prior experience, and the trainee evaluation committee develops an individually tailored training program based upon that pilot trainee's skill set and prior experience; comparisons between pilot trainees' performances in their respective training program are not relevant when assessing the pilot trainee's performance which is the subject of a notice of appeal and/or petition for review hereunder. Any documentation or testimony concerning the performance of other pilot trainees in their training program shall not be considered during any proceeding involved in the review process and shall not be submitted or solicited as evidence in any hearing under this section, nor shall it be submitted or solicited as evidence in any discovery deposition, nor shall it be included in the board's record of proceedings or any petition for review.
- (c) The scope of the hearing shall be limited to the validity of the training and evaluation process. The grounds for appeal shall be limited to the following issues:
- (i) Does the training and evaluation process comport with accepted psychometric and industrial/organizational psychology principles and evaluation?
 - (ii) Is the board's training and evaluation process a valid and reliable measurement system meeting all criteria of formative and summative assessment?
 - (iii) Is the training program job related?
 - (iv) Was the board's decision made pursuant to WAC 363-116-080(5) arbitrary and capricious?
- (d) The presiding officer shall issue an initial order at the conclusion of the hearing in conformance with the requirements of chapter 34.05 RCW and WAC 10-08-210.
- (4) Any petition for review of the initial order shall be filed in conformance with WAC 10-08-211. The chair of the board shall then appoint a "reviewing officer" who shall issue a final order. The standard of review by the reviewing officer shall be the same as that set forth in subsection (3)(c) of this section.

History

Statutory Authority: Chapter 88.16 RCW. 11-20-004, § 363-116-086, filed 9/21/11, effective 10/22/11.

Washington Administrative Code

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End of Document

APPENDIX 5

RANK ORDER	SUM3	SUM4	SUM5		SUM7	SUM8
1st	3.68	2.9	2.97		2.96	3.52
2nd	3.65	2.88	2.96		2.95	3.37
3rd	3.59	2.87	2.93		2.93	3.28
4th	3.49	2.85	2.91		2.92	3.26
5th	3.4	2.85	2.91		2.91	3.12
6th	3.39	2.83	2.89		2.9	3.01
7th	3.37	2.8	2.88		2.9	2.91
8th	3.27	2.78	2.87		2.9	2.87
9th	3.26	2.68	2.85		2.88	2.84
10th	3.24	2.67	2.81		2.88	2.82
11th	3.22	2.63	2.8		2.86	2.79
12th	3.2	2.63	2.78		2.87	2.79
13th	3.19	2.6	2.78		2.86	2.73
14th	3.18	2.54	2.78		2.82	2.7
15th	3.15	2.54	2.77		2.79	2.64
16th	3.07	2.53	2.7		2.71	2.6
17th	3.02	2.52	2.7		2.68	2.39
18th	2.96	2.41	2.61		2.65	2.3

KEY: MEDIAN SCORES
 TRAINEES LICENSED
CAPT. NELSON
OTHER TRAINEES DENIED

* Source: Table 7, Scontrino report (Hearing Exh. 57) **111**

** SUM-6 column omitted due to discrepancy in Intervention data